80-633

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLE

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RONALD HACKENBERGER d/b/a
RON'S TRUCKING SERVICE,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED[1]

1. Whether it is important and necessary for this court to enunciate standards for appellate court review of National Labor Relations Board adjudicatory proceedings and practices.

2. Whether the application of the National Labor Relations Board's rule proscribing meaningful pre-hearing discovery from the agency in non-adversarial back pay proceedings was in this case a violation of the agency's federal mandate and the petitioner's right to a fair hearing and due process of law.

3. Whether the National Labor Relations Board improperly determined that William F. Brown, Sr. had made a legally adequate effort to find alternative em-

[1] All parties to the proceeding in the United States Court of Appeals for the Sixth Circuit of which review is now sought, are named in the caption of this case.

ployment during the entire back pay period, in conflict with a recent decision of the United States Court of Appeals for the Ninth Circuit.

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NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Ronald Hackenberger, d/b/a Ron's Trucking Service, petitions for a writ of certiorari to review the order and decision of the United States Court of Appeals for the Sixth Circuit, entered in this case on August 20, 1980.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet officially reported. The supplemental decisions and orders of the National Labor Relations Board (Apps. B and C, *infra*) are reported at 236 NLRB No. 117.

JURISDICTION

The order of the court of appeals (App. A 1-2, *infra*) was entered and filed on August 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION, STATUTE AND REGULATIONS INVOLVED

1. U.S. CONST. amend. V provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public

danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The relevant part of the National Labor Relations Act (29 U.S.C. §151 *et seq.*) provides, at 29 U.S.C. §160(f), in pertinent part as follows:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just

and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

3. The relevant regulations and rules of the National Labor Relations Board are as follows:

a) 29 C.F.R. §102.52, N.L.R.B. Rules and Regulations Series 8, as amended, provides:

> After the entry of a Board order directing the payment of back pay or the entry of a court decree enforcing such a Board order, if it appears to the regional director that a controversy exists between the Board and a respondent concerning the amount of back pay due which cannot be resolved without a formal proceeding, the regional director may issue and serve upon all parties a back-pay specification in the name of the Board. The specification shall contain or be accompanied by a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 15 days after the service of the specification. In the alternative and at his discretion, the regional director, may under the circumstances specified above, issue and serve upon the parties a notice of hearing only, without the back-pay specifica-

> tion, the hearing to be held before an administrative law judge, at a place therein fixed and at a time not less than 15 days after the service of the notice of hearing.

b) N.L.R.B. Casehandling Manual, Compliance Proceedings (GPO 1977) §10663 provides in pertinent part:

> It is the policy of the Board that, upon request made by the respondent after the issuance of the backpay specification or of the notice of hearing without specification, factual information in documents obtained or prepared by the Regional Office which is relevant to the computation of the net backpay, including search for employment or availability for employment, or other forms of reimbursement, shall be made available.

STATEMENT OF THE CASE

I.
THE BASIS FOR FEDERAL JURISDICTION

On May 2, 1975 the National Labor Relations Board (hereinafter, NLRB or Board) issued a decision and order in

Ronald Hackenberger d/b/a Ron's Trucking Service, 217 NLRB 736. The Board determined that Ron's Trucking Service (the Company) had discriminatorily discharged William F. Brown, Sr. on September 24, 1974 (App. C.1). As a result, it ordered the Company to reinstate Brown and make him whole for any loss of earnings suffered because of his discharge. Mr. Brown was reinstated. However, the Company and the Board were unable to agree upon the amount of back pay owed to Brown. Accordingly, pursuant to the Board's Rules and Regulations, Series 8, as amended, 29 C.F.R. §102.52, a supplemental back pay proceeding was instituted for the purpose of determining the amount of money due.

After a hearing held on February 22, 1977 the Board issued a supplemental decision and order affirming the Administrative Law Judge's decision that Brown was owed back pay in the amount of

$31,675.62 plus interest at the rate of six percent per annum. Pursuant to 29 U.S.C. §160(f), the determination of the Board was appealed to the United States Court of Appeals for the Sixth Circuit. That federal court had jurisdiction over the appeal for the reason that the underlying unfair labor practice was determined to have taken place within the territory encompassed by the sixth circuit.

II.
STATEMENT OF THE FACTS

The procedural history underlying this petition may be briefly stated. The back pay specification and notice of hearing issued on November 30, 1976, and disclosed both the amount of Brown's interim earnings and the periods when he was unemployed. On December 11, the Company, in order to obtain discovery, filed an application to take Brown's deposition. Since the Company's request

for deposition was based only upon its honest desire for discovery and did not allege that the prospective deponent would be unavailable at the hearing, its request was summarily denied.

On December 27, 1976, a Motion to Produce was filed by the Company for the production of documents relating to interim earnings and the search for employment by William Brown after he left Ron's Trucking Service. Although counsel for the General Counsel admitted that the Company, not the General Counsel, bore the burden of proving interim employment, the General Counsel provided social security records only; the Company's motion was denied by the administrative law judge on January 11, 1977.

At the hearing on February 22, 1977, with all then-available witnesses already preset and ready to be called, the General Counsel finally gave the Company's counsel those documents which Brown had provided

the General Counsel to assist in the computation of the back pay specification (App. B.2, Record at 11-12). Specifically, the General Counsel proferred a list of employers Brown had contacted in his search for interim employment, social security forms, tax returns, and the result of a physical examination showing Brown's fitness for truck driving work. At that point it would have been impractical for counsel for the Company to request a continuance for several days in order to prepare for the hearing as he could have if the Company's request for such documents had been earlier and more timely granted; a shorter postponement would have been patently useless in the preparation and presentation of the Company's defenses. Instead, hoping to minimize the injury and inconvenience to the Company, counsel for the Company, under a continuing objection to the im-

propriety of the delay in the tender of documents, vigorously attempted to proffer the Company's case.

At the back pay hearing held on February 22, 1977, the charging party, William Brown, Sr., testified that two days after his discriminatory discharge from his truck driving job with the Company on September 24, 1974, Brown applied at the Norwalk, Ohio, unemployment office for unemployment compensation, which was thereafter denied, and registered for employment (App. C.3; Record at 13). He stated that he went there "more than one time" to seek work (Record at 15), but did not "remember going there in 1976." (Record at 16). He obtained no job referrals from that office (A. 119). In early January 1975, Brown registered for work at the Sandusky, Ohio, unemployment office about 20 miles from Norwalk. He visited the office a few times in 1975,

but received no job referrals from them (Record at 14-18, 45). In 1974, 1975, 1976 and 1977, Brown went to Freemont, Ohio, about 30 miles from Norwalk, to seek employment through the Teamster Union office there, but was again unsuccessful. (Record at 18-21).

Between October, 1975 and February, 1976, Brown contacted a Cincinnati Teamsters Union in order to determine whether it knew of any available jobs. However, he did not bother to contact any office of the Teamsters Union in Cleveland, much closer to his home. (Record at 22-24).

Occasionally, during the back pay period, Brown applied to various employers. (Record at 30-58). He stated that "in the first part of 1975" he had gone to a bakery looking for work, but he couldn't remember either the name of the place or the name of the personnel manager with whom he had spoken. Brown stated that

later, near the end of 1975 and in early 1976, he had sought work at some other trucking companies in Cincinnati. However, when pressed to do so, he could not remember being interviewed by anyone in charge of personnel there (Record at 24). Mr. Brown also applied for employment with Schangee, Youngstown Cartage and Charles Zeiter, but only filled out employment applications at the first two locations (Record at 40, 42). He went to McFarland's, Stump Bros., and C. J. Rogers in early 1975, but, as was his practice, once they told him they had no openings then he never returned. He went to very few of the places he would contact more than one time (Record at 45). Other than that, Brown's only effort was to watch the papers for different jobs that he felt he could qualify for and telephone the jobs that looked good to him. (Record at 25-26).

Mr. Brown's actual interim employment history was, not surprisingly, quite meager. All in all, from September, 1974 to February, 1977, he worked only approximately ten weeks, with much of that being part-time labor.

He worked for a company called T&T Home Security and Maintenance from September 28, 1974 through December 7, 1974 as a part-time employee. He voluntarily quit that employment and remained jobless until sometime in January, 1975, when he started work for the Imperial Gas Station in Norwalk, Ohio. He quit his job there in middle February, 1975, returned to work there in June and again voluntarily left his job there in late July or early August, 1975. From that time on during the back pay period, he was never gainfully employed. (Record at 30, 31). He contacted none of his several former employees (except for West Bakery) to see

if they had some position available (Record at 49-52) and did little else to attempt to secure employment.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit went outside the acceptable scope of review in the course of reaching its decision in the instant case. It is therefore necessary for this Court to clarify and define the limits of appellate review of an agency's adjudicatory proceedings and practices. The lower appellate court cannot be allowed to ignore or re-write the record of an NLRB's adjudication, as it did here, in order to uphold the agency's decision.

The NLRB's refusal to allow the petitioner meaningful pre-hearing discovery in a non-adversarial back pay proceeding was an unsupportable violation of the Constitutional restraints on its

discovery rule-making power. Additionally, it denied the petitioner the right to adequately prepare and present the petitioner's defenses, the right to a fair hearing and the right to due process of law.

Notwithstanding the foregoing, the decision of the court of appeals cannot stand because the order of the NLRB is, as a matter of law, not supported by substantial evidence. The charging party, William F. Brown, Sr., did not make a legally adequate effort to obtain interim employment during the back pay period. The decision of the court of appeals to the contrary is in direct conflict with the decision reached on the same issue upon nearly identical facts by the United States Court of Appeals for the Ninth Circuit.

I.
STANDARDS FOR APPELLATE COURT REVIEW OF NATIONAL LABOR RELATIONS BOARD ADJUDICATION PROCEEDINGS AND PRACTICES MUST BE CONSTRUCTED TO LIMIT THE SCOPE OF REVIEW TO THE RECORD AND THE ISSUES RAISED THEREFROM

Review of the conduct of the United States Court of Appeals for the Sixth Circuit in considering the issues before it in the instant case is necessary and proper. It is historically demonstrable that the NLRB has chosen to formulate, as well as implement, its policy decisions by way of adjudication instead of rule-making.[2] Supervision of this manner of policy-making by the federal courts is the only way that concerned individuals can be assured that they will be protected from arbitrary, unreasonable or improper decisions. The instant case demonstrates that guide-lines are now needed to define and clarify

[2] *NLRB Rulemaking: Political Reality versus Procedural Fairness*, 85 YALE L.J. 982 (1980)

the proper method or scope of review; an appellate court cannot disregard the record or go outside the facts presented to support a decision reached by the agency.

A.
The NLRB's Intensive Utilization of Adjudicatory Proceedings and Practices in Creating and Effectuating Policy Mandates the Immediate Formulation of Guidelines for Judicial Review of Such Agency Activity

The N.L.R.B. requires federal judicial supervision in order to prevent the agency from invidiously violating or overstepping its federal mandate. Because the Board establishes and enforces policy on a case by case basis, left untended it is capable of slowly eroding the boundaries of its powers.[3] This case provides clear examples of such over-reaching by the Board; the NLRB violated Constitutional restraints on its rule-making powers by denying the

[3] Id.

petitioner timely pre-hearing access to requested documents in a non-adversarial proceeding[4] and did not limit itself to the record in making its final adjudicatory determinations. The condonation of such behavior by the court of appeals cannot be tolerated.

The conduct and decision of the Board, as upheld by the Court of Appeals for the Sixth Circuit, must be and is reviewable. Judicial review of NLRB decision-making "serves as a check on arbitrary behavior" by the board or an Administrative Law Judge. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 775-80 (1969) (Douglas, J., dissenting). Although deference to agency determinations is, in general, a laudable general policy of the courts, it is inappropriate where, as here, the result reached by the agency is

[4] Specifically, the Due Process Clause of U.S. CONST. amend. V.

unreasonable[5] or in conflict with the law as pronounced by a sister federal court.[6] Hence it is now the duty of the Court to review and reverse the order of the sixth circuit in this case.[7]

B.
The Decisions of the Board and the Reviewing Court Must Be Limited By the Record Before Them and the Issues Raised Therefrom

The Board and reviewing courts cannot be allowed to ignore the facts on the record before them or go outside of that record in order to reach their results.

[5] Woodward, Levin, *In Defense of Deference: Judicial Review of Agency Action*, 31 Ad. L. Rev. 329 (1979)

[6] *NLRB v. Mercy Peninsula Ambulance Service, Inc.*, 589 F.2d 1014 (9th Cir. 1979)

[7] "Any agency rule which is not generally acceptable is a bad rule even if it is firmly based on a complete administrative record full of adversarial discussion and with all communications on the merits fully disclosed on the record." Kennedy, *Popular Dissatisfaction with the Administrative System: The Increasing Impact of Judicial Review*, 29 Ad. L. Rev. vii, xii (1977)

The intention of Congress to so limit administrative adjudications and the federal review thereof can no longer be doubted. *Chandler v. Roudebush*, 425 U.S. 840 (1976); *Popular Dissatisfaction with the Administrative System, supra* at ix. Nonetheless, in this instance, the Board and reviewing court clearly ignored the petitioner's uncontrovertable assertion that it had been wrongfully denied *pre-hearing* discovery in a non-adversarial back-pay adjudiciation and accordingly denied the right to prepare its claims and defenses without undue or excessive burden. Instead, the Board and the court of appeals went beyond the record. They supported their decisions with the weak assertion that, after the witnesses had been gathered and brought in to the hearing, a continuance *might* have been sought which, in the discretion of the same Board that had already denied the

petitioner's timely request for pre-hearing disclosure, *might* have been granted. However, even if petitioner had followed that questionable course, the fact of prejudice to the petitioner resulting from the refusal of the NLRB to supply the documents and information requested would have remained as an unerasable taint on the record. If the Board and the court of appeals had focused solely on the facts on the record and the issues actually arising therefrom, they would have been compelled to find that the petitioner's rights to pre-hearing discovery, a fair hearing and due process of law had been violated. It thus becomes the duty of this Court to redirect the court of appeals' and the Board's sights to correct this injustice and prevent its reoccurence.

II.
THE APPLICATION OF THE NLRB'S RULE PROSCRIBING MEANINGFUL PRE-HEARING DISCOVERY FROM THE AGENCY IN NON-ADVERSARIAL BACK PAY PROCEEDINGS WAS IN THIS CASE A VIOLATION OF THE AGENCY'S FEDERALLY CREATED DUTIES AS WELL AS THE PETITIONER'S RIGHT TO A FAIR HEARING AND DUE PROCESS OF LAW

The Board's procedures and rules governing pre-hearing discovery in non-adversary adjudications were inherently unfair and improper at the time the petitioner's claims were being reviewed by the Administrative Law Judge and the Board. "Fairness in adjudiciation . . . does require that the process of adjudication be structured so as to foster reasonably accurate determinations."[8] When adequate pre-hearing discovery is precluded without any valid reason in a back pay proceeding, the process of

[8] Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 Va. L. Rev. 383, 392 (1977)

adjudication does not foster the required result.

The Board's rule prohibiting free pre-hearing discovery in the instant case is unsupportable and violates the petitioner's right to due process of law for the reason that the rule does not fairly serve any valid governmental interest, while it imposes an insurmountable burden on the petitioner's private interests.[9] Unlike the situation found in the case of sensitive unfair labor practice proceedings, there is no potential harm that requires the protection of such a harsh rule against disclosure by the Board in a non-adversary back pay proceeding. Balancing the fact that the rule applied by the Board to the Petitioner in this case serves no legitimate purpose against the fact that the imposition of the rule

[9] *Id.* at 385, 392.

unfairly obstructs the Petitioner's right to a full and fair hearing, the rule and the decisions supporting it must be struck down.[10]

The subsequent implementation of practices designed to provide the fair proceeding that this employer demanded and to which this employer had a right did not lessen the fundamental unfairness and impropriety of the proceedings involving this party before the Board. In *January of 1978*, the General Counsel of the N.L.R.B. issued guidelines to his staff that contained the following provisions:

> 10663. *Disclosure of Factual Information Relevant to the Compilations*. It is the policy of the Board that, upon request made by the respondent after the issuance of the backpay specification, or of the notice of hearing without specification, factual information in documents obtained or prepared by the Regional Office which is relevant to the computation of the net backpay, including search for employment or availability for employment, or other forms of reimbursement, shall be made available.[11]

[10] *See generally Federal Open Market Committee v. Merrill*, 443 U.S. 340, 99 S.Ct. 2800, 2813 (1979).

It appears to be the position of the Board that because no similar specific guideline was in effect on February 22, 1977, when this case was heard by the Board, it had no duty to disclose any of the information relevant to the issue of backpay requested by Ron's Trucking Service, Inc., prior to the date of the hearing itself. This contention is without merit. Mere guidelines cannot shield the Board from the consequences of its failure to provide the employer with a fair hearing and a meaningful opportunity to present its case. As stated in the Chairman's Task Force on the NLRB for 1976, 93 LAB. REL. REP. (BNA) 243, 247:

> In back-pay cases, full disclosure should be available concerning information which would tend to verify, contradict, or further clarify the material in the files of the General Counsel.

[11] *N.L.R.B. Casehandling Manual (Part Three) Compliance Proceedings* (GPO, 1977).

See also Deering Milliken, Inc. v. Irving, 548 F.2d 1131 (1977).

The employer could not have had a meaningful opportunity to present all the factors that evidence the mitigation of his liability for backpay;[12] all of the relevant information was in the possession of the N.L.R.B., which would not disclose such data until the chance for a valid investigation of the facts contained therein had passed. Even though a backpay proceeding is objective and non-adversarial, the burden is still on the employer to demonstrate why or to what extent his liability should be limited. This burden is impossible to meet without a full opportunity to review, verify and supplement the information in the Board's possession.

[12] In any litigation it is axiomatic that the defendant or petitioner needs counsel "and counsel needs time." *Hawk v. Olsen*, 326 U.S. 271, 278 (1945); *Brescia v. New Jersey*, 417 U.S. 921, 926 (1974) (dessent).

The Board's adjudicatory practices and policies are necessarily constrained by the Due Process Clause of the Fifth Amendment. *International Telephone & Telegraph Corp. v. Local 134, Int. Bro. of Elec. W.*, 419 U.S. 428, 448 (1975). To quote the Court in *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975):

> Concededly, a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955). This applies as to courts. *Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973).

The Board's policy of precluding pre-hearing discovery from the agency, as practiced upon the petitioner, constituted a denial of due process and an abrogation of the petitioner's right to a fair hearing.[13]

[13] The facts of this case support the application of the often quoted proposition: "The touchstone of due process is the protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); Perry, *Constitutional "Fairness"*, *supra* at 426.

The absence of a guideline similar to the one that now exists does not justify the Board's refusal to tender the information sought when it was requested. The Board's actions must be governed by the broad constitutional and statutory policies that formed it. These policies, as expressed by Congress, and not the ever-changing guidelines of the Board are what must ultimately control the Board's conduct in these proceedings. These policies demand a full and fair hearing, a mandate that is impossible to fulfill without pre-hearing disclosure in backpay proceedings. The fact that the Board, after hearing this employer's earlier arguments, has recognized its duty to provide the disclosure that is necessary for a fair hearing and the furtherance of justice, does not excuse its earlier breach of this duty and failure to allow pre-hearing discovery. Accordingly, the Court should now review the

decisions of the Board and the Court of Appeals for the Sixth Circuit and exercise its authority to correct the injustice wrought upon the petitioner by the application of the Board's pre-hearing discovery rule.

III.
THE N.L.R.B.'S DETERMINATION THAT WILLIAM F. BROWN, SR. WAS ENTITLED TO RECEIVE THE AMOUNT AWARDED AS BACK PAY WAS IMPROPER AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE FOR THE REASON THAT MR. BROWN FAILED TO MAKE A LEGALLY ADEQUATE EFFORT TO SECURE ALTERNATIVE EMPLOYMENT DURING THE ENTIRE BACKPAY PERIOD

It is not the proper function of the NLRB to encourage slothfulness or to punish employers for any impropriety by the award of an excessive and unsupportable amount of backpay. The Board's power "to command affirmative action is remedial, not punitive." *Local 60, United Brotherhood of Carpenters and Joiners v. N.L.R.B.*, 365 U.S. 651, 655, 81 S.Ct. 875, 877, 6 L.Ed.2d 1 (1961) *quoting Consolidated Edison Co.*

v. N.L.R.B., 305 U.S. 197, 236, 59 S.Ct. 206, 83 L.Ed. 126 (1938). Although the petitioner may now be compelled to offer some backpay to Mr. Brown, the petitioner cannot be punished for Brown's idleness and refusal to take reasonable steps to mitigate his loss; the evidence does not support the proposition that Brown was reasonably diligent in seeking comparable or alternative employment.

Mr. Brown did not discharge his duty to search with reasonable diligence for employment comparable to that from which he had been discharged. An employee seeking backpay has a duty to mitigate his loss by seeking and accepting similar employment during the backpay period. This duty exists because the employer's backpay liability is mitigated not only by the earnings or compensation received by an employee after his discharge but also by the "losses willfully incurred" by an

employee for his failure to secure comparable employment without excuse. *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 197; 61 S.Ct. 845, 854 (1941); *N.L.R.B. v. Mercy Peninsula Ambulance Service, Inc.*, 589 F.2d 1014 (9th Cir. 1979). Although the employer has the responsibility of showing that the discharged employee failed to mitigate his damages, the Board's determination that "reasonable diligence" was exercised by the employee, as is required by the courts, *see, e.g., N.L.R.B. v. Arduini Manufacturing Corp.*, 394 F.2d 420 (1st Cir. 1968); *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966), must nonetheless be supported by substantial evidence. *N.L.R.B. v. Mercy Peninsula Ambulance Service, supra,* at 1018 and 1019 n.8; *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, S.Ct. 456, 95 L.Ed. 456 (1951).

After his discharge from Ron's Trucking Service, with well over 120 weeks in which to work, Brown was only employed for approximately ten weeks, most of that employment being part time. (App. C 3-6; Record at 13-27, 30, 35-38, 41-45 and 57-58.) This scant employment record did not evolve in spite of his diligent efforts to find work. To the contrary, it was the result and is demonstrable evidence of his failure to use reasonable diligence to mitigate the losses incurred as a result of his discharge.

In the nearly twenty-nine months of his unemployment, Brown visited less than twenty-five potential sources of employment. Other than the two places whereat he admits that he worked, he contacted only five of the places visited more than once and filed applications at less than half of them. Put simply, Brown made an average of less than two employment seeking

contacts a month in addition to any telephone inquiries he may have made in response to newspaper employment advertisements. The average rate of contacts was still lower after 1975.

As the court of appeals very recently held, it is not "reasonable to conclude that so few attempts constitute 'reasonable diligence'." *N.L.R.B. v. Mercy Peninsula Ambulance Service, Inc.*, (hereinafter *Mercy Peninsula*), *supra* at 1018-1019 and cases cited therein. In this especially significant case, the dischargee "made attempts at securing employment an average of only three times a month during each of the nine months . . . after his discharge." *Mercy Peninsula, supra* at 1018. In spite of the shorter duration of that dischargee's backpay period and his greater diligence in seeking alternative employment than Brown, the court held that his efforts were legally inadequate and

that there was not substantial evidence to support the Board's conclusion to the contrary.

The decisions of the Board and the Court of Appeals for the Sixth Circuit are in direct conflict with the cogent analysis and holding of the ninth circuit in *Mercy Peninsula, supra*. The incontrovertible demonstration to the Board and the court of appeals that Mr. Brown's efforts to secure interim employment were even less frequent and less diligent than those expended by the discriminatee in the ninth circuit case necessarily refutes any allegation that the Board's determination of Brown's eligibility for back pay was supported by substantial evidence. Necessarily, then, the decision of the sixth circuit court upholding the Board's determination must be reversed and the award of backpay vacated.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Cleveland, Ohio
October 17, 1980

BERNARD S. GOLDFARB
GOLDFARB & REZNICK
Eighteen Hundred
55 Public Square
Cleveland, Ohio 44113
(216) 781-0383

Attorney for Petitioner

APPENDIX A

FOR PUBLICATION

NO. 78-1334

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FILED

AUG 20 1980

JOHN P. HEHMAN, Clerk

RONALD HACKENBERGER d/b/a/
RON'S TRUCKING SERVICE

Petitioner

v.

ORDER

NATIONAL LABOR RELATIONS BOARD

Respondent

BEFORE: LIVELY and ENGEL, Circuit Judges; and BALLANTINE* District Judge.

The petitioner, Ronald Hackenberger d/b/a/ Ron's Trucking Service has petitioned for a review of a supplemental decision and order of the National Labor Relations Board, reported at 236 NLRB No. 117, in which back pay was allowed a discharged employee. The NLRB has filed a cross-application for enforcement.

Upon consideration of the record on appeal together with the briefs and oral arguments of counsel, the court concludes that the petitioner failed to establish that the Board had improperly computed the back pay of the discharged employee. The petitioner contends that he was prevented from showing that the discharged employee failed to act reasonably to mitigate his damages because the Board denied his request for information in its possession

*The Honorable Thomas A. Ballantine, Jr., Judge, U.S. District Court for the Western District of Kentucky, sitting by designation.

relating to the employee's interim employment. The court notes that when information concerning interim employment was provided at or near the beginning of the supplemental back pay proceedings, counsel for petitioner did not request a continuance or adjournment of the hearing in order to familiarize himself with the material and undertake any further preparation related thereto. Under these circumstances, we conclude that the petitioner was not subjected to unfair or unreasonable requirements.

The supplemental decision and order of the Board is enforced.

ENTERED BY ORDER OF THE COURT

John P. Hehman

Clerk

APPENDIX B

FPH

236 NLRB No. 117

D--3858
Norwalk, Ohio

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

RONALD HACKENBERGER d/b/a
RON'S TRUCKING SERVICE

and

Case 8--CA--8622

WILLIAM F. BROWN, SR., an Individual

SUPPLEMENTAL DECISION AND ORDER

On May 9, 1977,[1/] Administrative Law Judge Ralph Winkler issued the attached Supplemental Decision in this proceeding.[2/] Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[3/] and conclusions of the Administrative Law Judge.

1/ All dates hereinafter are 1977 unless otherwise indicated.
2/ The original Decision and Order in this proceeding is reported at 217 NLRB 736 (1975).
3/ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent contends that the denial of its request for information under the Freedom of Information Act,[4] hereinafter call FOIA, constituted a denial of due process and prevented Respondent from engaging in meaningful cross-examination. We find no merit to this contention inasmuch as the requested information was supplied to Respondent at the beginning of the hearing and Respondent has failed to show that it was prejudiced by the failure to produce the information earlier.[5]

The record establishes that Respondent sought documents concerning the interim earnings of William Brown, the discriminatee herein, under FOIA. On February 18, 1977, the request was denied by the Regional Director. Thereafter, the hearing was held on February 22. At the start of the hearing, prior to the examination of any witnesses, the General Counsel gave Respondent's counsel all the documents which Brown had provided to the Regional Office to assist in the computation of the backpay specification. Thus, the General Counsel proffered: a list of all the employers Brown had contacted in his search for interim employment, social security forms, tax returns, and the results of a physical examination showing Brown's fitness for truck driving work. Thereafter, the hearing proceeded and Respondent was afforded a full opportunity to cross-examine the witnesses.

The record further indicates that Respondent made no effort to pursue its remedies under FOIA. Thus, the Regional Director's denial of Respondent's request for the information clearly stated that under the Board's Rules and Regulations,

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4/ 5 U.S.C. 552, as amended, 88 Stat. 1561, 1563.
5/ Case Concrete Co., Inc., 220 NLRB 1306 (1975).

Series 8, as amended, Section 102.117 (b)(2)(ii) Respondent had 20 days to appeal the Regional Director's ruling to the General Counsel. However, there is no evidence of an appeal to the General Counsel nor of any further attempts to obtain the information requested prior to the hearing. Accordingly, we conclude that Respondent's failure to comply with the Board's rules and regulations in seeking the information requested precludes it from now asserting that the denial violated FOIA and/or Respondent's right to due process of law.[6/]

In this regard we note that Respondent has failed to offer any substantiation of its claim of prejudice with respect to the denial of the information requested. As noted above, Respondent was given the information at the start of the hearing, yet there is no evidence that Respondent requested additional time to examine the documents, and, in fact, Respondent proceeded to cross-examine the General Counsel's witnesses with the aid of the information earlier supplied by the General Counsel. Under these circumstances we find no merit to Respondent's contention that it was prejudiced by the Regional Director's denial of Respondent's request for information under FOIA.[7/] We therefore conclude, in agreement with the Administrative Law Judge, and for the reasons stated by him, that Respondent is obligated under the Board's Order to pay Brown the amount stated in the backpay specification.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Ronald

6/ Mid-West Paper Products Co., 223 NLRB 1367 at fn. 1 (1976); see also The Stride Rite Corporation, 228 NLRB No. 22 (1977).

7/ Under FOIA a request for information is made to the Regional Director and his decision is appealable to the Office of the General Counsel within 20 days after receipt of the notification. Thereafter, judicial review may be had in the district court.

Hackenberger, d/b/a Ron's Trucking Service, Norwalk, Ohio, his agents, successors, and assigns, shall pay the following amounts as listed in the attached backpay specification as Appendixes A and B. Interest is to be added at the rate of 6 percent per annum on the basis of the quarterly amounts of backpay due, in accordance with the formula as set forth in Isis Plumbing & Heating Co., 138 NLRB 716 (1962). There should be deducted from the amount due any tax withholding required by Federal and state law.

Dated, Washington, D.C. June 20, 1978

John H. Fanning, Chairman

John A. Penello, Member

Betty Southard Murphy, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

Calendar Quarter	Weeks	Average Weekday Earnings	Gross Backpay	Net Interim Earnings	Net Backpay
1974 III	1	$242.63	$ 242.63	-0-	$ 242.63
1974 IV	13	$242.63	$3,154.19	-0-	$3,154.19
1975 I	13	$242.63	$3,154.19	$212.10	$3,006.14
1975 II	13	$242.63	$3,154.19	$148.05	$2,868.32
1975 III	13	$242.63	$3,154.19	$285.87	$3,154.19
1975 IV	13	$242.63	$3,154.19	-0-	$3,154.19
1976 I	13	$242.63	$3,154.19	-0-	$3,154.19
1976 II	13	$242.63	$3,154.19	-0-	$3,154.19
1976 III	13	$242.63	$3,154.19	-0-	$3,154.19
1976 IV	6	$242.63	$1,455.78	-0-	$1,455.78

APPENDIX B

Quarterly Breakdown of Net Backpay

Calendar Quarter 1974	I	II	III	IV
Net backpay			$242.63	$2,847.19
Interest			36.39	384.37
Total			$279.02	$3,231.56
			1974 Subtotal:	$3,510.58

Calendar Quarter 1975	I	II	III	IV
Net backpay	$2,942.19	$3,006.14	$2,868.32	$3,154.19
Interest	353.05	315.64	258.14	236.56
Total	$3,295.14	$3,321.78	$3.126.46	$3,390.75
			1975 Subtotal:	$13,134.13

Calendar Quarter 1976	I	II	III	IV
Net backpay	$3,154.19	$3,154.19	$3,154.19	$3,154.19
Interest	189.25	141.93	94.62	47.31
Total	$3,343.44	$3,296.12	$3.248.81	$3.201.50
			1976 Subtotal:	$13,098.87

Calendar Quarter 1977	I	II	III	IV
Net backpay	$1,941.04			
Interest	-0-			
Total	$1,941.04			
			1977 Subtotal:	$1,941.04

Total backpay and interest due as of March 31, 1977: $31,675.62

APPENDIX C

JD-317-77
Norwalk, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

RONALD HACKENBERGER, d/b/a
RON'S TRUCKING SERVICE

and

Case 8-CA-8622

WILLIAM F. BROWN, SR.,

An Individual

Frank Motil, Esq., of Cleveland, OH, for the General Counsel.
Bernard S. Goldfarb, Esq., and Philip Fine, Esq., both of Cleveland, OH, for Respondent.

SUPPLEMENTAL DECISION

Statement of the Case

RALPH WINKLER, Administrative Law Judge: In a Decision and Order issued on May 2, 1975, the Board issued a conventional reinstatement and backpay order upon finding that Respondent had discriminatorily discharged William F. Brown, Sr., on September 24, 1974 (217 NLRB 736). The Court of Appeals for the Sixth Circuit enforced the Board's Order. 531 F.2d 364 (1976), cert. den. ___ U.S. ____ (October 4, 1976), 1/ 93 LRRM 2363. Hearing was held in this Supplemental matter on February 22, 1977, upon a backpay specification issued by the Regional Director for Region 8 on November 30, 1976, and Respondent's answer.

Upon the entire record, including my observation of the demeanor of witnesses and upon consideration of Respondent's brief, I make the following:

1/ Although the Supreme Court denied certiorari on October 4, 1976, Respondent did not offer the required reinstatement until more than 4 months later.

Findings and Conclusions

Respondent does not question the gross backpay figures in the specification (attached hereto as Appendices A and B), either as to the appropriateness of the method used or as to the resulting calculations. However, its answer presents the following affirmative defenses:

> 7. William Frederick, Brown, Sr., has failed to make a reasonable effort to find other employment in miitgation of the back pay award and demands proof thereof.
>
> 8. Respondent has no knowledge that William Frederick Brown, Sr. has made proper application to the Bureau of Unemployment Compensation and demands proof thereof, and/or that William Frederick Brown, Sr. was engaged in any enterprises of his own and demands proof thereof.
>
> 9. Respondent has no knowledge that William Frederick Brown, Sr. is physically qualified or that he has been physically qualified to perform within the rules and regulations of the Interstate Commerce Commission and/or Public Utilities Commission's physical and/or medical requirements and demands proof thereof.
>
> 10. The final back pay award figure was not computed correctly in that among other things it failed to account for and reduce or eradicate the award based on the projected work absenteeism of William Frederick Brown, Sr., compensation awards, individual remuneration or other income.

Before taking up Respondent's defenses, it may be appropriate to set forth the principles applicable here, as stated in N.L.R.B. v. NHE/Freeway, Inc., 545 F.2d 592, 593 (C.A. 7, 1976):

> While NHE makes no contest here of the Board findings as to the gross amount of back pay due, it does insist that the Board should have found that the willful failure of Ms. Patton and Ms. Young to seek other work during the back pay period relieved it of liability for back pay. In this connection, we view the duty of NHE differently. As was held in N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170, 178 (2nd Cir. 1965), cert. den. 384 U.S. 972 (1965), the "finding of an unfair labor practice . . . is presumptive proof that some back pay is owed." And the Board has discharged its burden when it finds the gross amount of the back pay due. Rutter-Rex, J. H. Mfg. Co. v. N.L.R.B., 396 U.S. 258 (1969). The burden then shifts to the violator "of establishing affirmative defenses which would mitigate his liability." N.L.R.B. v. Mastro Plastics Corp., 345 F.2d 170, 174 N. 3 (2nd Cir. 1965), cert. den. 384 U.S. 972.

"The burden of proving such willful loss is on the employer" and the discharged employee "is merely required to make 'reasonable efforts' to mitigate his loss of earnings." Hyster Company v. N.L.R.B., _____ F.2d _____, (C.A. 9, January 3, 1977). However, a discriminatee may not quit an interim job "without good reason." Mastro Plastics Corp., supra, at 174 n. 3.

Brown's efforts to mitigate backpay losses

Administrative Law Judge Harmatz found in the original hearing in this matter that Brown was a "trustworthy" witness whose testimony was "straightforward and candid" (217 NLRB at 739), and I was equally impressed with his trustworthiness.

Brown, it is recalled, was discriminatorily discharged in Norwalk, Ohio, on September 24, 1974. He is married and has six children ranging in age from 8 to 18 years. Two days after his discharge, Brown went to the Norwalk Unemployment Office to register for unemployment compensation, which was denied him, and to seek employment. He has continually checked in with that office ever since then to inquire about work, but has obtained no job referrals from them. Brown registered his availability at the Norwalk Office for work as a driver, janitor, machine operator, carpenter, and "anything I can get." Brown also registered for work at the Sandusky Unemployment Office early in January 1975. (Sandusky is approximately 20 miles from Norwalk). The Sandusky Office has not referred Brown to any jobs, and he visited them on at least three occasions in 1975 and has also responded to notices from that office advising them of his availability and that he had not found employment.

In 1974, 1975, 1976 and 1977, Brown also went to Fremont, Ohio (about 30 miles from Norwalk), to seek employment through the Teamsters Union office there, but without success. 2/ Brown also was unsuccessful in seeking work from a Teamsters Union in Cincinnati, Ohio (about 215 miles from Norwalk), in the period from October 1975 until February 1976. While in Cincinnati at that time, he also applied for work at several trucking establishments, but without results. During the period of his unemployment, Brown has also applied to various other employers, including nontrucking concerns, in Youngstown, Ohio, Mount Vernon, Ohio (25-30 miles from Norwalk), Tyro, Ohio (about 20 miles from Norwalk), Perrysburg, Ohio (some 20-30 miles from Norwalk), Sandusky, Ohio, Detroit, Michigan, and Lorain, Ohio (about 45 miles from Norwalk). And he went to Salyerville, Kentucky, for 4 weeks in 1976 to look for work in coal mines there. In searching for work, Brown also has regularly read the help-wanted advertisements in local newspapers, and he used his niece's telephone in Norwalk to inquire about job opportunities appearing in those papers for which he thought he might qualify.

2/ The Union Business Agent referred Brown to an inside bakery job, but the baking company did not believe Brown would be suitable.

Apart from attempting to impeach Brown's veracity, Respondent made no effort to show that jobs were actually available and that he would have obtained employment had he sought work as he testified.

Interim Employment

Brown obtained a job on September 28, 1974, with a company engaged in cleaning and sealing up government financed houses left by their occupants. Brown averaged between 5 or 10 hours to 20 hours weekly on this job; some of this work was performed in Youngstown, Ohio, on which occasion the workmen stayed in a camper. Brown's hourly rate on the job was $2.00, and was $2.50 when he worked out-of-town in Youngstown. Brown quit this job on December 7, 1974, under the following circumstances: He had been instructed by his boss to strip paneling from the walls and to take this paneling from the house (the boss wanted the paneling for his personal use); his boss further instructed him that if anyone inquired about this removal, he should say they had found the paneling already disengaged from the walls and that they were merely cleaning out the house; a local resident observed Brown carrying the stripped paneling from the house to the company truck and asked why he was taking the paneling; Brown responded along the lines his boss had instructed him to give. Brown quit that same day because, as he testified, "I was afraid I would get in trouble over stripping the houses." 3/

Brown's next interim employment was at an Imperial gas station in Norwalk where his son Billy had previously worked. Brown applied for the job to the station manager, Roger Parker, and Parker hired him as a station attendant on or about January 15, 1975, at an hourly rate of $2.10. In addition to gas and oil, the station sold clocks, lamps, jackets, ashtrays, and other merchandise. Three attendants, including Brown, were on Brown's shift. Brown's day off was on February 7, 1975, and he went to the station that day to pick up his check. Parker told Brown there was a purported cash shortage of approximately $90 and that he would not give the attendants their salary checks from Imperial unless they agreed to endorse the checks to be cashed by Parker and then allow Parker to retain $30 from each attendant's check to make up the shortage. Brown was not responsible for handling all monies, and he informed Parker that he would not be back. 4/ Brown thus quit.

3/ Brown did not report this matter to the authorities, and Respondent thereupon urges that Brown's testimony concerning his quitting should not be believed.

4/ Respondent introduced in evidence through Marvin Smith, the division manager of Imperial Refineries Corporation, Brown's personnel records with that Company. Smith is the custodian of the records but has no personal knowledge of their contents. Ray Carroll is the district manager and Smith's supervisor. The personnel record recites that Brown's February 7 separation was because he "just did not want to work any more outdoor." Smith testified that this explanation (Continued)

Some months later that year (1975), Brown's son, Billy, then living in Kentucky, asked Brown to inquire whether Billy could return to work at the Imperial station in Norwalk, and the station manager said he could. Billy meanwhile was injured in an accident and was unable to report for work, and Brown thereupon went to work a second time for Imperial, beginning on June 6, 1975. Brown worked without incident until July 19, 1975, and Parker had meanwhile been replaced as station manager. When Brown was given a salary check on July 19, the new manager (Bill Simson) said that Brown would have to make up a shortage of $28 for merchandise sold by Brown. Brown had in fact sold merchandise in that amount and had given the monies to another attendant, one Bob, who "carried the money" on that occasion and who also made the change for Brown at the time of the sale. Brown explained this to Simson, but Simson said that Brown would have to pay the $28. Brown paid the money and quit. 5/

During a period of approximately 6 months immediately prior to this hearing, Brown picked up "a little bit of scrap here and there" and sold it to a junkyard. He did not keep a record of such sales, and Respondent did not interrogate him further concerning that matter to establish if he made even as much as $10 from such effort.

On cross-examination by Respondent, Brown denied having had any interim employment at a junkyard called Jheme's Auto Wrecking Service. Principally to impeach the credibility of Brown's testimony respecting his efforts to seek employment and concerning his separation from his aforementioned interim employers, Respondent called Esther Mae Sheppard as a witness. Mrs. Sheppard testified that she participated with her husband in the management of Jheme's Auto Service and that they are in the business of "cleaning up the junk yard." Mrs. Sheppard testified that shortly after Brown's 1974 discharge by Respondent, they hired him on a temporary basis to clean and straighten up the junkyard, a job she believed would take 2 days,

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4/ (Continued) was inscribed by Carroll and that Carroll obtained the information from the station manager (presumably Parker). Respondent did not call or claim the unavailability of Parker or Carroll or anyone else with direct knowledge of Brown's separation. Brown truthfully denied having been unwilling to work outdoors and he also credibly denied having discussed such matter with any supervisor or that he quit for such reason.

5/ Respondent also introduced through Division Manager Smith the personnel record of Brown's July 19 separation (see footnote 4, supra). This record recites in Carroll's hand that Brown "was let go because of way he dressed & shortage." This too was based on information purportedly given Carroll by the station manager. Respondent did not call the station manager, "Bob" (the other attendant), or anyone else having personal knowledge of the incident. Brown credibly denied that he was discharged for shortages or for any other reason on July 19. His credible testimony is that he quit and was not fired.

and that she told her husband to fire Brown after Brown had spent 3 weeks on the job and that they hired someone else who completed the job in 2 days. Mrs. Sheppard testified, on cross-examination, that Brown did not work on a "specific 9-5" basis and that she did not know whether he had worked more than 32 hours altogether or that they had even paid him for more than 20 hours' work. When asked on cross-examination whether she had checked over her records in preparing her testimony, Mrs. Sheppard responded that "we didn't have any records on cleaning up a junk yard" and that they had no records indicating that Brown or "anybody" had ever worked for them. Mrs. Sheppard testified in explanation that they paid Brown in cash and that they made no record of such disbursement for tax purposes and that "there is no record at all of this transaction."

Respondent did not call Mr. Sheppard as a witness or assert at the hearing that it desired to do so but that Sheppard was unavailable. Nor has Respondent made any request that the record be reopened for the purpose of taking Sheppard's testimony. Nonetheless, in its brief filed after the hearing, Respondent attached a copy of a sworn affidavit executed by Sheppard on March 14, 1977, with purported records of cash payments to Brown, such records purportedly having been in Sheppard's possession since approximately April 1975.

Asserting that the record in this matter was closed on February 22, 1977, without any indication that Respondent intended to call further witnesses or to submit additional evidence, and Respondent not having made any request to reopen the record, the General Counsel filed a motion on April 6, 1977, to strike Respondent's brief. The General Counsel urges that the inclusion in the brief of the Sheppard affidavit and attachments is "highly improper and irregular. It is in patent disregard of General Counsel's basic right to cross-examine witnesses and/or to offer rebuttal testimony. . . . Moreover, it constitutes an attempt to prejudice a trier of fact by communications with him on a substantive issue without benefit of the most basic procedural safeguards normally accorded litigants." In answering the Motion to Strike, Respondent asserts that its brief was not filed as "evidence" or as an "attempt to introduce evidence," but merely to represent Respondent's "opinion" of the case.

Citation of authority is hardly necessary to document the soundness of the General Counsel's objection to including and relying on matters outside the record. Rather than strike the entire brief, however, I shall strike the Sheppard affidavit and attachments and all references in the brief to such affidavit. The General Counsel may be assured, moreover, that my decision in this case has not been affected by my having read the stricken materials.

Brown's "physical and/or medical" qualifications

At Respondent's request, Brown was examined on December 20, 1976, by a physician of Respondent's own choosing. The doctor issued a certificate on that date stating that Brown "is qualified physically in accord with

Rule 191.2 in the physical examination procedures prescribed by the Motor Carriers' Safety Regulations, etc., of the Interstate Commerce Commission."

Concluding findings

When not employed since his unlawful discharge in 1974, Brown has continually made a good faith effort to obtain other employment and the Respondent has wholly failed to meet its burden that Brown has not done so. And it may not be found, at least I cannot find, that Brown was unreasonable in quitting his employment with his two interim employers, given the circumstances and the provocation he had in each instance. Nor, in the circumstances of this case and contrary to Respondent's contention, may it reasonably be found that Brown withdrew from the labor market during the 6-months period he was picking up scrap metal. 6/

In brief, I conclude that Respondent has not established that Brown willfully incurred a loss of earnings or that the General Counsel's specification as amended at the hearing 7/ does not accurately reflect the backpay to which Brown was entitled through the sixth week of the fourth quarter of 1976. By letter of March 19, 1977, Respondent advised all other parties that it had reinstated Brown on March 2, 1977. The General Counsel, on March 10, 1977, submitted an updated computation of backpay due, amounting to $31,675.62, based on the assumption that Brown would be reinstated on or about March 1, 1977, and including interest at 6 percent per annum calculated through March 31, 1977 (Appendix C, attached hereto, contains relevant material from this updated computation. I have placed this computation with covering letter in the exhibit files).

I accordingly conclude upon the entire record in this case that Respondent is obligated under the Board's Order to pay to Brown a total amount of $31,675.62 and that interest shall continue running from April 1, 1977, and shall be added to the amount due until payment of all backpay. Payment of this sum shall be less any taxes required to be withheld by Respondent under Federal and State law. 8/

Dated, Washington, D. C. May 9, 1977

Ralph Winkler
Administrative Law Judge

6/ In addition to checking with the Norwalk Unemployment Office during this period, he continued checking with trucking and nontrucking concerns, including plants in Lorain and Sandusky, Ohio.

7/ A net earnings figure of $307 was added in the fourth quarter of 1974.

8/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings and conclusions herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings and conclusions, and objections thereto shall be deemed waived for all purposes.

APPENDIX A

Computation of Average Weekly Earnings

Base Period	June 4, 1974 to September 24, 1974
Total Earnings	$3,882.17
Number of Weeks	16
Average	$242.63

APPENDIX B

Calendar Quarter	Number of Weeks	Average Weekly Earnings	Gross Backpay	Net Interim Earnings	Net Backpay
1974 III	1	$242.63	$ 242.63	-0-	$ 242.63
1974 IV	13	$242.63	$3,154.19	-0-	$3.154.19
1975 I	13	$242.63	$3,154.19	$212.10	$2,942.09
1975 II	13	$242.63	$3,154.19	$148.05	$3,006.14
1975 III	13	$242.63	$3,154.19	$285.87	$2,868.32
1975 IV	13	$242.63	$3,154.19	-0-	$3,154.19
1976 I	13	$242.63	$3,154.19	-0-	$3,154.19
1976 II	13	$242.63	$3,154.19	-0-	$3,154.19
1976 III	13	$242.63	$3,154.19	-0-	$3,154.19
1976 IV	6	$242.63	$1,455.78	-0-	$1,455.78

APPENDIX C

Quarterly Breakdown of Net Backpay

Calendar Quarter 1974	I	II	III	IV	
Net backpay			$242.63	$2847.19	
Interest			36.39	384.37	
Total			$279.02	$3231.56	
			1974 Sub-Total:		$3510.58

Calendar Quarter 1975	I	II	III	IV	
Net backpay	$2942.19	$3006.14	$2868.32	$3154.19	
Interest	353.05	315.64	258.14	236.56	
Total	$3295.14	$3321.78	$3126.46	$3390.75	
			1975 Sub-Total:		$13,134.13

Calendar Quarter 1976	I	II	III	IV	
Net backpay	$3154.19	$3154.19	$3154.19	$3154.19	
Interest	189.25	141.93	94.62	47.31	
Total	$3343.44	$3296.12	$3248.81	$3201.50	
			1976 Sub-Total:		$13,089.87

Calendar Quarter 1977	I	II	III	IV	
Net backpay	$1941.04				
Interest	-0-				
Total	$191.04				
			1977 Sub-Total:		$1,941.04

Total backpay and interest due as of March 31, 1977: $31,675.62

No. 80-633

In the Supreme Court of the United States

OCTOBER TERM, 1980

RONALD HACKENBERGER d/b/a RON'S TRUCKING SERVICE,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
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WILLIAM A. LUBBERS
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
ROBERT E. ALLEN
Acting Associate General Counsel
NORTON J. COME
Deputy Associate General Counsel
LINDA SHER
Assistant General Counsel
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Attorney
National Labor Relations Board
Washington, D.C. 20570

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-633

RONALD HACKENBERGER d/b/a RON'S TRUCKING SERVICE,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Board properly found that a back pay claimant had made a reasonable effort to find alternative employment during the back pay period.

2. Whether petitioner was prejudiced by the Board's refusal of its requests for prehearing discovery.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 628 F. 2d 966. The supplemental decision and order of the Board (Pet. App. B and C) are reported at 236 N.L.R.B. 1065.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1980. The petition for a writ of certiorari was filed on October 20, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Board found that petitioner had unlawfully discharged one of its employees, William F. Brown, Sr. The Board therefore ordered petitioner to reinstate Brown, and to make him whole for any loss of earnings suffered as a result of the unlawful discharge (217 N.L.R.B. 736 (1975)). The court of appeals upheld (531 F. 2d 364) the Board's order, and this Court denied certiorari (429 U.S. 830 (1976)).

Petitioner then contested the amount of back pay that was due to Brown. Accordingly, the Board's Regional Director issued a back pay specification and ordered a hearing.[1] The administrative law judge who heard the evidence rejected petitioner's assertion that Brown had not made a reasonable attempt to secure interim employment. The administrative law judge noted that Brown had registered with the Norwalk, Ohio unemployment office within two days after his discharge, and that he had, throughout the backpay period, continually checked in with that unemployment office, as well with one in Sandusky, Ohio,

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[1]Section 102.53(a) of the Board's Rules and Regulations, 29 C.F.R. 102.53(a), requires that the back pay specification show "the back pay periods broken down by calendar quarters, and specific figures and basis of computation as to gross back pay and interim earnings, the expenses for each quarter, the net back pay due, and any other pertinent information".

regarding work opportunities (Pet. App. C 3; A. 114-119, 146).[2] Brown also traveled to Fremont and Cincinnati, Ohio, attempting to obtain employment through the Teamsters Union offices there, and he sought employment with various employers in Ohio, Michigan, and Kentucky during his period of unemployment (Pet. App. C 3; A. 119-125, 142-146). Brown also regularly checked the help-wanted advertisements in local newspapers, and he used his niece's telephone to inquire about jobs for which he thought he might qualify (Pet. App. C 3; A. 126-127). Brown secured interim work with two employers during the back pay period, but the administrative law judge found that Brown was justified in leaving both of those jobs (Pet. App. C 7).[3]

The administrative law judge concluded that, "[w]hen not employed since his unlawful discharge in 1974, Brown has continually made a good faith effort to obtain other employment and [petitioner] has wholly failed to meet its burden that Brown has not done so" (Pet. App. C 7). The administrative law judge noted that petitioner "made no effort to show that jobs were actually available and that [Brown] would have obtained employment had he sought work as he testified" (Pet. App. C 4).

The Board affirmed the decision of the administrative law judge on the merits (Pet. App. B). The Board also rejected petitioner's contention that the denial of its

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[2]"A." references are to the appendix in the court of appeals.

[3]Brown quit his job at T & T Home Maintenance after he had been instructed to engage in the questionable practice of stripping paneling from an unoccupied home for the personal use of his boss (Pet. App. C 4; A. 128-131). On two occasions during his employment at an Imperial gas station, Brown quit after being forced to forfeit part of his pay to make up for cash shortages for which he was not responsible (Pet. App. C 4 to C 5; A. 132-139).

requests for pre-hearing discovery constituted a denial of due process.[4] The Board pointed out that all of the requested material had been supplied to petitioner at the beginning of the hearing and that petitioner had then proceeded to cross-examine the General Counsel's witnesses with the aid of the information supplied, without requesting a continuance to examine the material (Pet. App. B 2 to B 3). The Board concluded that petitioner had not been prejudiced by the denial of prehearing discovery in these circumstances (Pet. App. B 3).

2. The court of appeals upheld the Board's supplemental decision and enforced its order, concluding that petitioner had failed to establish that the Board's back pay award was improper (Pet. App. A 1 to A 2). The court held that petitioner "was not subjected to unfair or unreasonable requirements" by the Board's prehearing discovery policy, and specifically noted that "when information concerning interim employment was provided at or near the beginning of

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[4]Petitioner's request to take Brown's deposition was denied because petitioner did not allege that Brown would be unavailable to testify at the hearing (A. 19-20).

Petitioner's request for the production of all documents in the Board's possession relating both to Brown's interim employment and to the Board's back pay computation was denied, except that Brown's social security records were supplied under the Board's then-existing policy of providing counsel with social security records and letters from interim employers in advance of the hearing (A. 26-28).

Eight days before the scheduled hearing, petitioner requested substantially the same information under the Freedom of Information Act, 5 U.S.C. 552 (A. 33). This request was denied by the Board's Regional Director four days later (A. 34-36), and petitioner did not appeal this determination to the General Counsel.

Subsequent to the hearing at issue here, the General Counsel issued new guidelines providing for greater disclosure in backpay cases. The new guidelines, which constitute an amendment to the operational manual which the General Counsel provides for the guidance of his staff, *N.L.R.B. Casehandling Manual—Compliance Proceedings*, pt. 3 (1977), are set out in pertinent part in the petition (see Pet. 5).

the supplemental back pay proceedings, counsel for petitioner did not request a continuance or adjournment of the hearing in order to familiarize himself with the material and undertake any further preparation related thereto" (*ibid.*).

ARGUMENT

1. In making an employee whole for loss of pay that results from an employer's unfair labor practices, the employee's actual interim earnings and any losses willfully incurred are deducted from gross pay. *Phelps Dodge Corp.* v. *NLRB,* 313 U.S. 177, 197-198 (1941). Back pay may be reduced, under the willful loss of earnings doctrine, to the extent that the employee "fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work or voluntarily quits alternative employment without good reason." *NLRB* v. *Mastro Plastics Corp.,* 354 F. 2d 170, 174 n.3 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). Accord, *Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO* v. *NLRB,* 547 F. 2d 598, 602-603 (D.C. Cir. 1976), cert. denied, 429 U.S. 1078 (1977). The General Counsel's burden in the back pay proceeding is limited to showing the gross back pay due the employee, that is, what the employee would have earned if the employer had not violated the Act. *NLRB* v. *Mastro Plastics Corp., supra,* 354 F. 2d at 175-176. Once the General Counsel has established the amount of back pay due under an appropriate back pay formula, "the burden is upon the employer to establish facts which would negative the existence of liability * * * or * * * mitigate that liability." *NLRB* v. *Brown & Root, Inc.,* 311 F. 2d 447, 454 (8th Cir. 1963). Accord, *NLRB* v. *Reynolds,* 339 F. 2d 668, 669 (6th Cir. 1968); *NLRB* v. *Arduini Mfg. Corp.,* 394 F. 2d 420, 423 (1st Cir. 1968).

Petitioner does not cotest the validity of these well settled principles. Instead, petitioner challenges (Pet. 30) only the Board's factual finding, which was upheld by the

court of appeals, that Brown was reasonably diligent in seeking interim employment. That factual issue does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951).

Contrary to petitioner's contention (Pet. 19, 33-34), the decision below is not inconsistent with the Ninth Circuit's decision in *NLRB* v. *Mercy Peninsula Ambulance Service*, 589 F. 2d 1014, 1018-1019 (1979), in which the court concluded that an unlawfully discharged employee had not exercised reasonable diligence in seeking interim employment. In that case, the record showed that during the back pay period, the employee had attempted to secure employment on an average of three times a month over nine months; that he had not followed up job leads; that he had evidenced a lack of interest in finding work; and that he had devoted a substantial amount of his time to promoting an employee association (589 F. 2d at 1018-1019). Thus, *Mercy Peninsula* is distinguishable on its facts from the instant case, where the record shows that Brown made persistent efforts to secure interim employment, traveling far outside his home area in search of work.[5]

2. There is no merit to petitioner's contention that it was denied a fair hearing through the denial of its prehearing discovery requests.[6] It is settled that, so long as the Board

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[5]Even assuming the correctness of petitioner's contention (Pet. 32) that Brown visited fewer than twenty-five potential employment sources during the period of his unemployment, the record also shows that Brown continuously sought work through other channels—such as unemployment offices, Teamsters Union locals, and newspaper employment notices—and that he actually found interim work with two employers before quitting under justifiable circumstances (see pages 1, 2 & note 3, *supra*).

[6]No issue is raised here under the Freedom of Information Act, 5 U.S.C. 552. Petitioner's FOIA request was denied by the Regional Director and, although petitioner was advised of its right to appeal to the General Counsel, it did not do so (Pet. App. B 2 to B 3; A. 34-36).

conducts its proceedings in accordance with the requirements of due process, the question whether to permit prehearing discovery is within the Board's discretion. See *NLRB* v. *Valley Mold Co.*, 530 F. 2d 693, 695 (6th Cir.), cert. denied, 429 U.S. 824 (1976); *D'Youville Manor, Lowell, Mass., Inc.* v. *NLRB*, 526 F. 2d 3, 7 (1st Cir. 1975); *NLRB* v. *Interboro Contractors, Inc.*, 432 F. 2d 854, 858 (2d Cir. 1970), cert. denied, 402 U.S. 915 (1971); *Electromec Design & Development Co.* v. *NLRB*, 409 F. 2d 631, 635 (9th Cir. 1969); *NLRB* v. *Vapor Blast Mfg. Co.*, 287 F. 2d 402 (7th Cir. 1961).

Here, the Board found that petitioner was not prejudiced by having less extensive prehearing discovery than that which it sought. That finding, which was upheld by the court of appeals, turns on the particular circumstances of this case, and it raises no issue that warrants further review.[7]

At all events,the Board's finding is clearly correct. At the commencement of the hearing, petitioner received all the information that it had previously sought in its prehearing discovery demand. Prior to the examination of any witnesses, the General Counsel gave petitioner all the documents that Brown had provided to assist in the computation of the backpay specification (A. 43, 112-113). Specifically, the General Counsel gave petitioner a list of the potential employers whom Brown had contacted in his search for interim employment, Brown's social security forms, his tax returns, and the results of a physical examination which showed Brown's fitness for truck driving work (Pet. App. B 2; A. 112-113).

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[7]The issue raised by petitioner also lacks general importance in light of the General Counsel's intervening revision of the operational manual, which now provides for prehearing disclosure of such materials in back pay cases. See page 3, note 4, *supra*.

Essentially, petitioner bases its due process claim on the contention that it was prejudiced by not having the requested material in advance of the hearing. As the Board and the court of appeals both noted, however, petitioner did not request additional time to examine the documents when they were provided, but proceeded to cross-examine Brown when he was produced as a witness by the General Counsel (A. 147-162). Following the hearing, petitioner made generalized claims of unfairness and suggested that it had been denied a meaningful opportunity for cross-examination (A. 70-77), but it never attempted to substantiate its claims by demonstrating with specificity how the timing of the disclosure had prevented it from either following up useful leads or asking pertinent questions of witnesses. When the hearing was terminated, petitioner expressed no interest in calling further witnesses or submitting additional evidence, and petitioner never sought thereafter to reopen the record to submit evidence discovered through leads provided either by Brown's testimony or by the materials that were disclosed at the hearing.[8]

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[8]Following the hearing, petitioner submitted a post-hearing affidavit from an available witness who had not been called, which affidavit supported a version of events that conflicted with the testimony of one of petitioner's own witnesses. That affidavit was striken from the record by the administrative law judge (Pet. App. C 6).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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